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CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS
COMMITTEE STATEMENT
COMMITTEE ON THE JUDICIARY
SUBJECT: EXECUTIVE PRIVILEGE AND
CONGRESSIONAL OVERSIGHT
MAY 15, 2019
2141 RAYBURN HOUSE OFFICE BUILDING
10:00PM

- Thank you Mr. Chairman.
- I thank you for yielding the floor on this important topic and I thank you for convening this hearing, which will undoubtedly shed light on a topic that will be fore of mind for many Americans.
- So before I proceed further, let me welcome the panel to our committee:
 - Kate Shaw, Professor of Law, Cardozo Law School, Yeshiva University
 - Paul Rosenzweig, Senior Fellow, National Security & Cybersecurity, R Street Institute
 - Jonathan Turley, Professor of Law, George Washington University School of Law

- Neil Kinkopf, Professor of Law, Georgia State University College of Law
- The topics I hope you will discuss will illuminate the topics this committee, this Congress and this Country have been deliberating, and have been considering from any number of mile-markers since the start of this presidential administration.
- This is because since this Congress began conducting oversight over this president, the White House has indicated that it will not be responding to any overtures at oversight and would instead be asserting an all encompassing executive privilege, which it believes will forestall any oversight into this administration.
- Notably, the claim is before us today because of reports that the President seeks to invoke executive privilege to block the testimony of Don McGahn, former White House Counsel and who is currently noticed to appear before this committee in 6 days.
- For some Americans, the topics discussed this morning are eerily reminiscent of that which we discussed almost 50 years ago, during the second presidential administration of Richard Nixon.
- During that time, the country was steeped in a political controversy emanating from the circumstances surrounding political espionage and whether one side used subversive methods to gain an upper hand ahead of a national presidential contest.
- Then, like now, the Congress became involved, and began probing serious questions about presidential power and in the face of unsatisfactory responses from the president, the country then – as seems to be the case now – became steeped into a discussion of executive privilege.
- The conflict in 1974, of course, was settled by the landmark case of *United States v. Nixon*.
- That case held:

“Neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 177; *Baker v. Carr*, 369 U.S. 186, 211. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the confidentiality of Presidential communications is not significantly diminished by producing material for a criminal trial under the protected conditions of *in camera* inspection, and any absolute executive privilege under Art. II of the Constitution would plainly conflict with the function of the courts under the Constitution. *United States v. Nixon*, 418 U.S. 683, 703-707 (1974).

And, the Supreme Court further indicated:

Although the courts will afford the utmost deference to Presidential acts in the performance of an Art. II function, *United States v. Burr*, 25 F.Cas. 187, 190, 191-192 (No. 14,694), when a claim of Presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on the ground that military or diplomatic secrets are implicated, but merely on the ground of a generalized interest in confidentiality, the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial and the fundamental demands of due process of law in the fair administration of criminal justice. 418 U.S. 707-713.

- And here we are now, with today's assembled panel, about to hear the very real strictures of executive privilege.

- When the Special Counsel submitted his report into Russian interference into the 2016 election and whether that crime was aided and abetted by associates of the Trump campaign, it was revealed that the White House Counsel sat for over 30 hours with the Special Counsel and his team answering questions about how the Office of the President, and its occupant, conducted itself and himself while the investigation into whether he obstructed justice.
- Moreover, the decision to permit the White House Counsel to speak freely with the Special Counsel was one—at the time—rooted in a desire to be perceived—by the public—as transparent.
- McGahn told Mueller that Trump on multiple occasions directed him to fire the special counsel, including by ginning up a fanciful claim that Mueller had a conflict of interest.
- Trump thereafter directed McGahn to lie about Trump’s campaign and to write a letter falsely asserting that Trump had not directed him to fire the special counsel, Mueller’s report said.
- McGahn’s testimony also helped establish another obstruction offense: Trump’s instructing his former campaign manager, Corey Lewandowski, by then a private citizen, to tell then-Attorney General Jeff Sessions to limit Mueller’s probe to future elections.
- As if that were not enough, the American people learned last Friday that after the Mueller Report was published, the President asked his Don McGahn to publicly state that he did not commit obstruction of justice.
- Soon after the release of the Special Counsel’s report, Chairman Jerrold Nadler, and this Committee issued a subpoena requiring that McGahn produce all documents in his possession and testify before the committee about the 33 subjects listed in the subpoena’s schedule, including, among other things:
 - the investigation into National Security Adviser Michael Flynn;

- the firing of FBI Director James Comey;
- Attorney General Jeff Sessions's recusal from the Russia investigation;
- the resignation or termination, "whether contemplated or actual," of Sessions, Deputy Attorney General Rod Rosenstein, and Special Counsel Robert Mueller;
- the infamous Trump Tower meeting;
- other figures such as Paul Manafort, Roger Stone and Rick Gates;
- as well as information about the handling of the investigations into President Trump and his various companies and organizations by prosecutors in the U.S. Attorney's Office for the Southern District of New York.
- The President now seeks to block the American people from hearing from Don McGahn for himself and telling the American people all to which he swore under oath to Robert Mueller.
- So it is against that backdrop that we welcome you to this Committee to help the American people understand the President's position and determine whether his position rooted in the constitution or just garden-variety intransigence.

Questions for Professor Shaw

In *U.S. v. Nixon*, the Supreme Court recognized the President has a general interest in maintaining confidentiality of communications with close advisors but made it clear presidential privilege was not absolute.

1. ***In terms of the balancing test they used, can you articulate the factors the court considered in reaching its holding?***
2. In your written statement to the committee, you said that the court *OGR v. Holder* "firmly rejected the Department of Justice's argument that 'because the executive is seeking to shield records from the legislature, another co-

equal political body, the law forbids the Court from getting involved.” Do you does that suggest a role for Article III Courts?

3. If the president continues to refuse to allow the Mueller report to be released to Congress, acting as a shield, and the law forbids the Supreme Court from weighing in, what legal recourse does the committee have for those documents to be released to us?

Questions for Professor Kinkopf

Given your experience at DOJ’s Office of Legal Counsel, if a government agency has a subpoena for documents, would it be a normal response for a President to withhold it from that agency’s purview by claiming *every single document* of it falls under the executive without specific justification,

1. ***What kind of review (in camera or otherwise), if any, would each document need to undergo to determine whether it is subject to that privilege?***
2. ***As the nature of the information is important to determining if executive privilege is asserted by the President, how particularized must his justification be?***

Questions for Mr. Rosenzweig

President Trump did not make any assertion of executive privilege when he permitted numerous White House aides and other administration officials to be interviewed by the Special Counsel’s office. Moreover, as the Attorney General confirmed in his April press conference, the President waived executive privilege with respect to the Mueller report itself. Attorney General Barr said “no material [was] redacted based on executive privilege.” As they have both previously stated nothing in the documents fall within executive privilege,

1. Can the President now make a “protective assertion” of privilege over all the redacted materials in the Mueller Report and all the underlying evidence, having previously waived that privilege?

The D.C. Circuit has held publication of otherwise-confidential information, like Mr. McGahn’s testimony and communications in the Muller Report” waives privileges for the documents *or information* specifically released.”

1. Would this also imply the White House cannot assert executive privilege over testimony by Mr. McGahn related to information already revealed by the Muller Report?